IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

R.S.A. No. 53 of 1995

Judgment reserved on 25.5.2007

Decided on: 28.6.2007

Krishan Chand and others **...Appellants.**

VERSUS

Nand Lal and others **…Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting? Yes

For the appellants : Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta & Janesh, Advocates.

For the respondents: M/sDushyant Dadwal & Paresh Sharma, Advocates.

Surjit Singh, Judge

This appeal by the plaintiffs / appellants is directed against the judgment and decree dated 20.10.1994 of the first Appellate Court whereby dismissing the appeal, decree passed by the trial Court, dismissing the suit of the appellants / plaintiffs, has been affirmed.

2. Plaintiffs / appellants filed a suit for declaration that the orders of mutations dated 3.9.1986 (No. 2679) and 30.8.1986 (No. 2815),

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Whether reporters of Local Papers may be allowed to see the Judgment?

passed by the Assistant Collector II-Grade, Arki were illegal, void and against the facts and law and hence not binding upon them and the proforma defendant / respondent Ramesh Chand. By way of further relief issuance of permanent prohibitory injunction restraining respondents / defendants No. 1 and 2 Nand Lal and Jagat Ram, respectively, from causing any interference in the possession of the plaintiffs over the land measuring 5 Bighas 2 Biswas, bearing Khasra No. 281/1, situated at Mauza Bikrampur (Kot), Pargana Pobar, Tehsil Arki, was sought.

3. Cause of action, as disclosed in the plaint, may be summed up thus. One Shri Durga was owner in possession of the above described land, which shall hereinafter be referred to as the suit land. Vide sale deed registered on 28.10.1977 said Durga sold the suit land to Lachhi Ram, predecessor of the plaintiffs, and delivered the possession to him. Lachhi Ram got mutation entered, but before the same could be attested, he expired. The result was that in the revenue papers the entries continued to show Durga, the vendor as owner in possession. After the death of Lachhi Ram, Durga on being instigated by defendants / respondents Nand Lal and Jagat Ram started interfering in the possession of the plaintiffs over the suit land. The plaintiffs then filed a suit against Durga and others, which was registered as 'Suit No. 10/1 of 1980'. That suit was later on withdrawn, when Durga and others stopped interfering in the possession of the plaintiffs. Durga thereafter filed a suit, which was registered as 'Suit No. 45/1 of 1981' (re-registered as 'Suit No. 91/1 of 1983') seeking declaration that the sale deed registered in favour of Lachhi Ram on 28.10.1977 was void. Durga died during the pendency of the suit. Defendants Nand Lal and Jagat Ram got that suit dismissed in default on 2.5.1984. The plaintiffs then got a mutation entered on the basis of the sale deed executed in favour of their predecessor Lachhi

Ram, vide No. 2679. Under the influence of the father of the defendants, who is an Ex-Pardhan, that mutation was rejected by the concerned Revenue Officer. Not only this, on the basis of some bogus Will of Durga, the Revenue Officer attested the mutation in respect of the suit land in favour of the defendants. The plaintiffs, therefore, filed the suit for declaration that the two orders of mutation passed by the Assistant Collector, II-Grade, Arki – one with regard to mutation entry based on the sale deed in favour of their predecessor Lachhi Ram, thereby rejecting the mutation and the other passed in favour of the defendants on the basis of the alleged Will of Durga, thereby ordering the entry of the names of the defendants in the column of ownership and possession - were illegal, void and of no consequence.

4. The respondents / defendants contested the suit. Various preliminary objections were raised. Suit was alleged to be not maintainable. Jurisdiction of the Court was also alleged to be barred. Plea of limitation was also raised. Suit was alleged to be barred under Order 23 Rule 1 of the Code of Civil Procedure also. One of the plaintiffs, namely Krishan Chand was alleged to be not the son or a legal heir of deceased Lachhi Ram and hence having no locus standi to file the suit. The plaintiffs were alleged to have had no cause of action. Plea of estoppel was also raised.

5. On merits it was admitted that Durga was the owner of the suit land, but it was denied that he had executed any sale deed in favour of the plaintiffs' predecessor Lachhi Ram. It was alleged that the land was in possession of the defendants as tenants under Durga since the year 1972 and they had been paying rent in kind, i.e. half of the produce of the land. It was alleged that in a suit filed by the plaintiffs against Durga, i.e. Civil Suit No. 10/ 1 of 1980 (re-registered as 'Suit No. 72/1 of

1983') Durga had admitted the defendants to be his tenants qua the suit land. It was also alleged that similar admission was made by Durga in favour of the defendants in another Suit, i.e. Civil Suit No. 45/1 of 1981 (re-registered as 'Civil Suit No. 91/1 of 1983). It was alleged that the sale deed had been got executed by Lachhi Ram by playing fraud upon Durga. Elaborating the particulars of fraud, it was alleged that Durga's thumb impression was obtained by making him believe that the writing was a Will. It was alleged that in any case possession had not been delivered to the plaintiffs as it was already with the defendants, who were inducted as tenants much before the impugned sale. Also, it was alleged that the sale consideration, mentioned in the sale deed, had not been paid.

6. Trial Court framed various issues based on the pleadings of the parties and tried the matter. It returned the finding that the plaintiffs were not owner in possession of the suit land. The orders passed by the Assistant Collector, II-Grade on the mutation entries were held to be valid and lawful. Suit for declaration was held to be not maintainable. It was held that Durga had inducted the defendants as tenants on the suit land. However, all other issues based on the preliminary objections of the defendants, except the issue pertaining to maintainability of the suit, were found against the defendants. As regards the issue of maintainability of the suit, it was held that so far as plaintiff / appellant Krishan Chand was concerned, the suit was maintainable, but as regards the other plaintiffs, it was not maintainable. With the aforesaid findings the suit was dismissed.

7. The plaintiffs went in appeal to the Court of learned District Judge. Learned Additional District Judge, to whom the appeal was assigned, upheld the findings of the trial Court and dismissed the appeal.

8. Present appeal was admitted on the following substantial questions of law:-

> "1. Whether the alleged writings Exhibits DW-1/A was inadmissible in evidence for want of stamp duty and also hit by the provisions of Section 17 and 49 of the Indian Registration Act?
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> 2. Whether the sale deed Exhibit PW-1/A, due execution and registration of which was duly proved on record can be held to be inoperative on the ground that the evidence regarding passing of consideration has not been adduced?
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> 3. Whether there was presumption of truth attached to the certificate of Sub Registrar over the said document and onus to prove contrary ought to have been on the defendants – respondents?
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> 4. Whether the sale deed Exhibit PW-a/A can be set aside by both the Courts below without there being proper pleadings and proof of the circumstances taken into consideration by both the courts below?
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> 5. Whether the findings regarding defendants being tenant over the suit land are based upon misreading and misconstruing the oral and documentary evidence and are unsustainable being based upon false and fabricated documents?

9. I have heard the learned counsel for the parties and perused the record.

10. The appellants / plaintiffs relied upon the sale deed Ext. PW-2/A by which their predecessor Lachhi Ram allegedly purchased the suit land from Durga, the previous owner. To prove this deed the plaintiffs / appellants examined its scribe PW-2 Lala Ram, who stated in no uncertain terms that the deed was scribed by him as per instructions of Durga, the vendor. No suggestion was put to this witness on behalf of the respondents / defendants on the lines of their plea that Durga's thumb impression was obtained on the document by mis-representing to him that it was a Will. The only suggestions, which were thrown to the witness, were that he did not know Durga personally. It is not in dispute

that Durga had gone to Arki to execute a document in favour of Lachhi Ram, the predecessor of the plaintiffs appellants, though it is a different matter that the defendants allege that he was taken to Arki by Lachhi Ram on the pretext that he (Durga) was to execute a Will in his (Lachhi Ram's) favour and in lieu thereof he (Lachhi Ram) would be rendering service to him (Durga). Therefore, the suggestion thrown to the witness in the cross-examination that Durga was not personally known to him, is meaningless.

11. One of the marginal witnesses of the sale deed, namely Durga son of Darbhangi, was examined by Durga, the alleged vendor as his witness in Civil Suit No. 95/1 of 1981 on 19.4.1983. Copy of the statement is Ext. DW-1/T. The witness though stated that his signature as a witness on the sale deed Ext. PW-2/A was obtained by Lachhi Ram by misrepresenting to him that it was a Will, yet in the cross-examination he did not deny the suggestions that he had identified Durga before the Sub-Registrar at the time of the registration of the document t and that Sub-Registrar had read over and explained the contents of the sale deed to Durga the vendor and Durga admitted the same to be correct. He simply expressed ignorance about the suggestions, which means that the suggestions were not denied by him. The suggestions included that Durga admitted having received the sale consideration of Rs.3,000/- at home. He also did not deny that he and the other attesting witness of the document, named Bhagat Ram signed the sale deed before the Registrar of documents at the time of its registration. Non-denial of these suggestions by Durga Ram son of Darbhangi, one of the attesting witnesses of the sale deed, coupled with the fact that the sale deed is duly registered and bears the endorsement of the Registrar that he had read over and explained the contents of the sale deed to the executant

Shri Durga as also the aforesaid testimony of scribe Lala Ram (PW-2), prove beyond doubt that sale deed Ext. PW-2/A was executed by Durga in favour of Lachhi Ram. The fact is further strengthened by the testimony of PW-6 Lal Chand, who registered the document in his capacity as Sub-Registrar. The witness proved the endorsement of the registration. As already noticed, the endorsement is to the effect that the contents of the sale deed had been read over and explained to the executant and he admitted the same to be correct.

12. The cumulative effect of the above discussion is that the execution of the sale deed Ext. PW-2/A by late Durga stands duly proved.

13. It is recited in the sale deed Ext. PW-2/A that the possession of the subject matter of the sale deed stood delivered to Lachhi Ram. It is in the light of the finding that the sale deed Ext. PW-2/A is genuine and it recites that the possession stood delivered to Lachhi Ram, the evidence of the respondents / defendants about the suit land having been given to them by Durga, the vendor, for cultivation on payment of rent in kind, needs to be appraised. Sale deed Ext. PW-1/A is dated 28.10.1977. On 10.12.1977 report was made to the Patwari about this sale deed for the purpose of attesting mutation. The Patwari entered the mutation for the purpose of submission to the Revenue Officer for attestation. In the meanwhile Lachhi Ram died and nobody pursued the matter. In August 1980 after the death of Lachhi Ram, the present appellants / plaintiffs filed a suit against Durga, the father of the present respondents / defendants, as also the respondents / defendants seeking issuance of permanent prohibitory injunction restraining them from causing any interference in the suit land. Copy of the plaint is Ext. DW-1/R. They claimed title to the suit land on the basis of the sale deed Ext. PW-2/A. The respondents/ defendants and their father Durga filed

written statement, copy Ext. DW-1/Q, in which they denied that the plaintiffs were in possession. They pleaded that Durga, the previous owner of the land, had inducted them as tenants about eleven – twelve years back on payment of rent in kind and that they were still in possession as tenants. It was alleged that the suit was bad for non-joinder of Durga, the alleged vendor. Durga then filed an application under Order 1 Rule 10 of the Code of Civil Procedure for being impleaded as party. Copy of the application is Ext. DW-1/O. In this application he pleaded that Lachhi Ram had got executed sale deed in his favour by playing fraud on him. It was alleged that in fact he was made to believe at the time of the execution of the document that it was a Will. It was denied that any consideration had passed. After the making of the aforesaid application, Durga died. Thereafter the suit was got dismissed by the appellants / plaintiffs with the statement that the interference in their possession was no longer there. The copy of the order is on record though not proved.

14. Durga, the alleged vendor, also filed a suit seeking declaration that the sale deed No. 262, dated 28.10.1977 was the result of fraud played upon him by the plaintiffs. Copy of the plaint is Ext. PW-1/D. In the said plaint it was alleged that the predecessor of the present plaintiffs / appellants assured him that he would be maintaining him, in case he executed a Will in his favour and that he believed the predecessor of the present plaintiffs / appellants and the latter got executed a sale deed from him by misrepresenting that the document was a Will. The appellants / plaintiffs contested that suit and denied the allegation. It appears that that suit was dismissed in default after the death of Durga.

15. It is true that in the application under Order 1 Rule 10 of the Civil Procedure Code (Ext. DW-1/O), moved by Durga, the vendor, as also in the suit filed by him, copy of the plaint Ext. PW-1/D, it was specifically alleged by said Durga that he had given the land for cultivation to respondent / defendant Nand Lal and his brother on 'Gala Batai' (sharing of crop in lieu of rent), but from the evidence on record it appears that this plea had been cooked up only after the appellants / plaintiffs filed a suit seeking injunction against the respondents / defendants claiming that the suit land had been sold to Lachhi Ram their predecessor, by Durga. The respondents / defendants have produced a writing, purporting to be the lease deed, executed in their favour by Durga. The same is Ext. DW-1/A. As per this writing, which purports to be dated 18.5.1972, Durga gave the land for cultivation to respondent / defendant Nand Lal as tenant and by way of rent the tenant was to share the produce with the land-owner. However, the deed does not mention the share of the produce, which was to be given to the land-owner.

16. Certain receipts have also been produced, which are Exts. DW-1/B-1 to DW-1/B-9, against which the respondents / defendants allege to have given the Durga's share of produce to him. All these receipts are written on the same size of small pieces of paper and their language is also almost identical.

17. Durga in his application under Order 1 Rule 10 of the Code of Civil Procedure, copy Ext. DW-1/O, vide para 4 stated that he had given the land for cultivation to defendant Nand Lal on payment of 1/4th of the produce by way of rent, but Nand Lal, while in the witness box as DW-1 in this case, stated that he had been giving, by way of rent, half of the total produce to Durga. This contradiction in the recital in the aforesaid application and the statement of DW-1 Nand Lal knocks the

bottom out of the respondents / defendants' plea of tenancy and shows that both the documents of tenancy, i.e. Ext. DW-1/A and the receipts Exts. DW-1/B-1 to DW-1/B-9, are fabricated. More-over, Durga neither in his application (copy Ext. DW-1/O) nor in the plaint, copy Ext. PW-1/D, alleged that he had executed any writing regarding creation of tenancy in favour of respondent / defendant Nand Lal and that he had been furnishing receipts to him after receiving the rent in kind. This fact also suggests that the documents may not be genuine. Otherwise also, Ext. DW-1/A, which purports to create a lease from year to year basis, (because the lease is for agricultural purpose and hence by virtue of provision of Section 106 of the Transfer of Property Act it is to be deemed to be one from year to year basis) cannot be looked into as a piece of evidence on account of its being unregistered.

18. The two Courts below have disbelieved the transaction of sale inter alia on the ground that sale consideration had not passed. The view taken by the two Courts below is incorrect both legally and factually. As already noticed hereinabove, the sale deed categorically recites that the sale consideration had already been paid at home and the endorsement of the Sub-Registrar is to the effect that the contents of the deed had been read over and explained to the executant, namely Durga, the vendor, who after admitting the same to be correct, put his thumb impression on the sale deed. As far as the legal position is concerned, non-payment of sale consideration is not a sine qua non for a legal and valid sale transaction.

19. Another reason recorded by the two Courts below for disbelieving the sale transaction is that the possession had not been delivered to the vendee, namely Lachhi Ram, the predecessor of the plaintiffs / appellants. This view is also factually as well as legally

incorrect. As already noticed, it is recited in the sale deed that the possession stood delivered to the vendee. Defendants' plea of tenancy, as held hereinabove, is cooked up. So far as legal position is concerned, delivery of possession is also not a sine qua non for effecting legal and valid sale of immovable property.

20. As a result of the above stated position, all the substantial questions of law are answered in favour of the appellants / plaintiffs. Consequently, appeal is accepted, judgment and decree of the trial Court dismissing the suit and the judgment and decree of the first Appellate Court dismissing the appeal against the decree of the trial Court, are set aside. Suit of the appellants / plaintiffs is decreed and it is declared that mutation Nos. 2679, dated 2.9.1986 and 2815, dated 23.8.1986, are illegal, void and of no consequence upon the right, title and interest of the plaintiffs / appellants, who are owners in possession of the suit land. Further decree for permanent prohibitory injunction restraining the respondents / defendants from causing any interference in the possession of the appellants / plaintiffs over the suit land is passed in favour of the appellants / plaintiffs and against the respondents / defendants.

June 28, 2007 (BC) **(Surjit Singh)**
Judge